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CASE NO.: 89-57

In The

SUPREME COURT

Of The

UNITED STATES

OCTOBER TERM, 1988

JOHN M. PICCIOLO, DEFENDER YACHT CORP. and ATLANTIC AEROMARINE ASSOCIATES, INC.,

Petitioners,

vs.

CLEVELAND JONES, JR., CAROLINE JONES, FRANK JONES, JOYCE JONES and JONES BOAT YARD, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI REVIEW

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FEDERAL QUESTION PRESENTED

Whether the assertion of federal regulatory jurisdiction over a privately owned, constructed and maintained boat basin imposes a coextensive navigational servitude so as to establish a right of public access to and use of that private waterway.

SUMMARY OF ARGUMENT

The only federal question presented by Petitioners has already been settled by the United States Supreme Court. In Vaughn v. Vermilion, 444 U.S. 206, 62 L.Ed.2d 365, 100 S.Ct. 399 (1979), the Supreme Court held that "no general right of use in the public arose by reason of the authority over navigation conferred upon Congress by the Commerce Clause of Art I of the United State Constitution." Id. at 208-209. Accord, Kaiser Aetna v. United States, 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979). Accordingly, there is no reason for the Supreme Court to review this case under Rule 17, Rules of the Supreme Court.

ARGUMENT

Although Petitioners assert three separate questions for review by the Supreme Court, the only federal question presented is whether the regulatory jurisdiction of the United States over a private boat basin automatically makes that private waterway open for use by the public so that a state court cannot enjoin individuals from trespassing upon it. The Supreme Court has already settled this question against Petitioners. In Vaughn v. Vermilion, 444 U.S. 206, 62 L.Ed.2d 365, 100 S.Ct. 399 (1979), the Supreme Court addressed the question as follows:

> The second [federal question] is whether channels built on private property and with private funds, in such a manner that they ultimately join with other navigable waterways, are similarly open to use by all citizens of the United States . . . . We think that our opinion in Kaiser Aetna v. United States . . . adequately answers the second question presented for review and that the Louisiana Court of Appeal was correct in determining that on such facts no general right of use in the public arose by reason of the

> authority over navigation conferred upon Congress by the Commerce Clause of Art I of the United States Constitution (Emphasis added).

Id. at 208, 62 L.Ed.2d 368, 100 S.Ct. 401. Petitioners' present position was articulated in Vaughn v. Vermilion by the separate dissenting opinion of Justice Blackman who asserted a public right of access to and use of privately owned waterways:

> [R]espondent's predecessors in interest voluntarily undertook to transform land into navigable water for purposes of obtaining access to a highway of waterborne commerce. In doing so, they subjected their former fast land to the dominant federal interest in navigation and surrendered the right to control access to the canals.

Id. at 210, 62 L.Ed.2d 369, 100 S.Ct. 399. The opinion of the Supreme Court, however, rejected Justice Blackman's position and affirmed the judgment of the state appellate court which had held that no general right of public use of a private waterway arose by reason of the regulatory authority over navigation conferred upon Congress by the Commerce Clause. That same conclusion

applies to the judgment of Florida's appellate court below.

Petitioners' position on this federal question has likewise been rejected by the Supreme Court in Kaiser Aetna v. United States, 444 U.S. 164, 62 L.Ed.2d 332, 100 S.Ct. 383 (1979). In Kaiser Aetna, the Supreme Court expressly cautioned "that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called 'navigational servitude' cannot simply be lumped into one basket." Id. at 170, 62 L.Ed.2d 340, 100 S.Ct. 391. The Court pointed out that in many of the same cases presently relied upon by Petitioners, "the concept of navigability . . . was used for purposes other than to delimit the boundaries of the navigational servitude." Id. at 171. Accordingly, the Supreme Court concluded that the federal government's expansive regulatory authority over navigable waters was not coextensive with the public's navigational servitude:

> [T]his Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kaupa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access. (Emphasis added)

Id. at 172 - 173, 62 L.Ed.2d 341, 100 S.Ct. 391. As in the Vaughn v. Vermilion decision, it was only the separate dissenting opinion of Justice Blackman which adopted the position advanced by Petitioners in this case that the public's right to use a private navigable waterbody was coextensive with the federal government's power to regulate that waterbody. Id. at 180, 62 L.Ed.2d 347, 100 S.Ct. 398.

CONCLUSION

Petitioners have presented no federal question which has not already been settled by the Supreme Court. Unless the Court wishes to revisit its decisions in

Vaughn v. Vermilion and Kaiser Aetna v. United States, and to impose a public navigational servitude on privately owned waterways that is coextensive with the regulatory jurisdiction of Congress under the Commerce Clause, there is no reason under Rule 17, Rules of the Supreme Court, for the Court to review this case. Accordingly, the petition for writ of certiorari should be denied.

DATE: August 28, 1989

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